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No. 82-720

In the Supreme Court of the United States

OCTOBER TERM, 1982

NORMAN ASHCROFT, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

DIRK D. SNEL
MARIA A. IIZUKA
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether businesses operated on fee land held by non-Indians within the boundaries of the Navajo Reservation are "reservation businesses" within the meaning of 25 C.F.R. 252.3(*l*) and thus subject to federal licensing requirements under 25 C.F.R. Part 252.

2. Whether fee patent land located within the boundaries of the Navajo Reservation is "Indian Country" under 18 U.S.C. 1151.

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OPINIONS BELOW

The opinion of the court of appeals as amended (Pet. App. 33-43, 60-61) is reported at 679 F.2d 196. The opinion of the district court (Pet. App. 43-58) is reported at 513 F.Supp. 595.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1982. A petition for rehearing was denied on September 2, 1982 (Pet. App. 60). The petition was filed as of October 12, 1982, on October 25, 1982. The jurisdiction of this Court is properly invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are non-Indian owners or operators of businesses located on fee land within the exterior boundaries of the Navajo Reservation.[1] The Bureau of Indian Affairs

[1]The Navajo Reservation consists of approximately 9.1 million acres (E. R. 55; "E.R." denotes the Excerpts of Record filed in the court of

("BIA") of the Department of the Interior notified petitioners that they must comply with procedures set forth in 25 C.F.R. Part 252 (1981), governing business practices on the Navajo, Hopi and Zuni Reservations.[2] The regulations, promulgated in 1975 and thereafter, require, inter alia, that reservation businesses obtain BIA licenses, abide by price marking and credit practices, and refrain from selling fake Indian handicrafts or antiquities from historic ruins or monuments (Pet. App. 67-81).[3]

On February 23, 1978, petitioners sued officials of the Department of the Interior to halt enforcement of the regulations. On March 3, 1978, the district court issued a temporary restraining order which, by stipulation, was to remain in effect pending a decision on the merits. Ruling on stipulated facts and cross-motions for summary judgment, the district court issued a permanent injunction on March 17, 1981, barring enforcement of the regulations as to petitioners' businesses (Pet. App. 59). The district court held that the regulations do not apply to businesses, such as petitioners', that are "conducted on fee owned land which is surrounded by the Navajo Indian Reservation" (Pet. App.

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appeals). Approximately 11,860 acres are held in fee by individual owners, including these petitioners; the remainder is held in trust by the United States for the benefit of the Tribe or its members.

[2]These regulations have since been recodified at 25 C.F.R. Part 141. For convenience, we shall cite to the earlier codification, which is reproduced in the appendix to the petition (Pet. App. 67-81).

[3]The regulations implement the Indian Trader statutes, now codified at 25 U.S.C. 261-264 (Pet. App. 62). Among other things, those statutes authorize the Commissioner of Indian Affairs to appoint traders to the Indians and to promulgate regulations governing such traders "for the protection of * * * Indians" (25 U.S.C. 262). The regulations were promulgated in compliance with *Rockbridge* v. *Lincoln*, 449 F.2d 567 (9th Cir. 1971), a class action brought on behalf of Navajo Indians to require the Commissioner to adopt and enforce regulations governing traders doing business on the Navajo Reservation.

46) and that the businesses are not located within "Indian Country" as defined in 18 U.S.C. (Supp. V) 1151 (Pet. App. 55-57).

The court of appeals, in reversing the judgment of the district court, held that "businesses conducted on non-Indian fee land within the exterior boundaries of the Navajo Reservation are subject to the regulations at 25 C.F.R. Parts 251 and 252 enacted pursuant to the Indian Trader Statutes" (Pet. App. 40). Relying on this Court's opinion in *Montana* v. *United States*, 450 U.S. 544 (1981), the court of appeals concluded that "[a] tribe retains some elements of sovereignty over all land within reservation boundaries, absent the exclusive jurisdiction of another tribe or that of the federal government * * *. With respect to non-Indian fee land within the reservation, the tribe retains sovereign power to the extent necessary to protect tribal self-government or control internal relations" (Pet. App. 37-38). The court concluded that the BIA's determination that petitioners' businesses were subject to the regulations in 25 C.F.R. Part 252 (1981) was consistent with this "inherent tribal sovereign power" (Pet. App. 39), noting that any other result would thwart the salutory intent of the regulations: "to protect Indians from the sharp practices of unregulated traders" (*id.* at 40).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The petition presents no issue warranting further review.

1. Petitioners' entire argument appears to rest on the proposition that there is some critical distinction to be drawn from the fact that their land was not included within the original boundaries of the Navajo Reservation as established by the June 1, 1868, Treaty with the Navajo Indians

(15 Stat. 667), but instead came to be within the boundaries of the reservation as later enlarged by a series of executive orders issued between 1878 and 1907.[4] Whatever may be the consequences of this history in other contexts, it has no logical bearing on the applicability of the Indian Trader statutes and the regulations promulgated thereunder. The focus of those statutes and regulations is the protection of reservation Indians from unscrupulous traders, and it is wholly irrelevant to that purpose how or when petitioners' land came to be surrounded by the Navajo Reservation. It is not plausible to assume that Congress meant to protect only those Indians who trade with businesses located on land that was always within the boundaries of the original reservation, but to leave unprotected Indians who trade with businesses that are located within additions to the original reservation.[5]

Since 1790, "the Federal Government has comprehensively regulated trade with Indians to prevent 'fraud and imposition' upon them." *Central Machinery Co.* v. *Arizona Tax Commission*, 448 U.S. 160, 163 (1980), quoting

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[4]The executive order additions were confirmed by the Act of June 14, 1934, ch. 521, 48 Stat. 960. See *Healing* v. *Jones*, 210 F.Supp. 125, 141 n.14 (D. Ariz. 1962), aff'd, 373 U.S. 758 (1963).

[5]As the court of appeals correctly recognized (Pet. App. 43 n.3), it is of no consequence that petitioners engage in only a small amount of business with Indians. Nothing in the Indian Trader statutes even remotely suggests a "substantiality" test, nor would it be consistent with the statutes' purposes to deny protection to Indians based on the percentage of a particular establishment's sales to non-Indians. Additionally, as a matter of practical administration, it would be infeasible for Interior to regulate only sales to Indian consumers. The regulation relating to price marking (25 C.F.R. 252.16 (1981)) affords a prime example — Interior cannot possibly know in advance whether the purchaser of a particular item will be an Indian or a non-Indian, and thus it must necessarily require any reservation business that sells to Indians to mark all of its prices in accordance with the regulation if it is to ensure that Indian consumers receive the protection intended by Congress.

H.R. Rep. No. 474, 23d Cong., 1st Sess. 11 (1834); see also *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685, 686-690 (1965). In light of this purpose, the Court has given the Indian Trader statutes " 'a sweep as broad as [their] language' * * * and interpret[ed] them in light of the intent of the Congress that enacted them * * *." *Central Machinery Co., supra*, 448 U.S. at 166 (citations omitted), quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966). The regulations of the Department of the Interior challenged by petitioners in this case accomplish Congress' purpose by defining "reservation business" as "a person that engages at a fixed location or site within the exterior boundaries of the Navajo * * * Reservation[] in the sale or purchase of goods or services or in consumer credit transactions with Indians * * *" (25 C.F.R. 252.3(*l*)(1981)).[6] Interior's regulation sensibly recognizes that Congress' intention to protect the Indians would be thwarted by any rewording of the definition that would exclude those businesses not located within the original 1868 reservation boundaries, even though such businesses are now unquestionably within the reservation.[7] And, as the agency charged with implementing Congress' enactments for the protection of Indians, Interior's regulation is entitled to special deference (*Stevens* v. *Commissioner*, 452 F.2d 741, 746 (9th Cir. 1971), quoting *United States* v. *Jackson*, 280 U.S. 183, 193 (1930) (citations omitted)):

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[6]The regulations define "persons" to include "a natural person, a corporation, trust, estate, partnership, cooperative or association" (25 C.F.R. 252.3(j)(1981)).

[7]Petitioners claim support for their argument that fee land outside the original reservation boundaries can never be "Indian country" (Pet. 19) in this Court's decisions in *DeCoteau* v. *District County Court*, 420 U.S. 425 (1975), and *Rosebud Sioux Tribe* v. *Kneip*, 430 U.S. 584 (1977). Petitioners' reliance on these decisions is misplaced. Both cases construed Acts of Congress that *diminished* the original reservation boundaries; neither case involved land *added* to a reservation by subsequent executive orders and statutes.

> As the agency charged with the administration of the Indian laws and responsible for drafting many of them, Interior's interpretation is entitled to "great weight" and "is not to be overturned unless clearly wrong * * *."

Petitioners have advanced no sound reason, consistent with the purposes of the Indian Trader statutes, for overturning Interior's definition of "reservation business." On the contrary, the restrictive reading of the regulations that petitioners urge on the Court would frustrate "the salutory goal of the statute which is to protect Indians from the sharp practices of unregulated traders * * *" (Pet. App. 40). See also *Central Machinery Co., supra*, 448 U.S. at 165.[8]

2. Petitioners concede that "land which is Indian country, *regardless of ownership*, may be deemed [to be] 'on the reservation' " (Pet. 12; emphasis added; see also Pet. 21), and thus subject to regulation under the Indian Trader statutes. But petitioners erroneously assert, first, that Indian country encompasses only land the Indian title to which has not been extinguished (Pet. 16-18) and, second, that the broader definition of Indian country in 18 U.S.C.

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[8]There is no occasion for the Court to consider petitioners' assertion (Pet. 24) that the decision below conflicts with *Montana* v. *United States*, 450 U.S. 544 (1981). In *Montana*, the Court addressed only the *tribe's* authority to regulate non-Indian hunting and fishing. In this case, by contrast, it was the BIA, and not the tribe, that sought to enforce the regulations; thus, no question concerning the extent of retained tribal sovereignty is presented. The mere fact that the regulations authorize tribal enforcement (25 C.F.R. 252.11(b)(1981)) does not create a justiciable controversy in the absence of any action by the tribe. In any event, tribal enforcement would be fully consistent with this Court's recognition that "[a] tribe may regulate * * * the activities of non-members who enter consensual relationships with the tribe or its members, through commercial dealings, contracts, leases, or other arrangements." *Montana* v. *United States*, *supra*, 450 U.S. at 565.

(Supp. V) 1151[9] is "limited by its own terms to the Federal Criminal Code" (Pet. 19). Both contentions are erroneous.

As early as 1913, this Court rejected petitioners' narrow definition of "Indian country." In *Donnelly* v. *United States*, 228 U.S. 243 (1913), the Court noted that the definition of Indian country contained in the Indian Trade and Intercourse Act of June 30, 1834, ch. 161, 4 Stat. 729, upon which petitioners rely (Pet. 16-17), "was not reenacted in the Revised Statutes and was therefore repealed" (228 U.S. at 269). Although the Court acknowledged that "the definition as contained in the act of 1834 may still be referred to in connection with the provisions of its original context that remain in force * * *,' " the Court nevertheless held that, because " 'the changes which have taken place in our situation' are so numerous and so material," the definition of "Indian country" could no longer "be confined to land formerly held by the Indians, and to which their title remains unextinguished" (*ibid.*). Thus, notwithstanding the fact that "[s]ome earlier cases had suggested a more technical and limited definition of 'Indian country' * * * [i]t is the more expansive scope of the term that was incorporated in the 1948 revision of Title 18." *United States* v. *John*, 437 U.S. 634, 649 n.18 (1978).

Under the curent definition of Indian country, of course, the fact that land is owned in fee by a non-Indian on territory included within the boundaries of a reservation does not in any way affect its status as "Indian country"; 18

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[9]In pertinent part, 18 U.S.C. (Supp. V) 1151 provides (emphasis added):

> Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country" as used in this chapter, means (a) *all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent*, and, including rights-of-way running through the reservation * * *.

U.S.C. (Supp. V) 1151(a) (see page 7 note 9, *supra*) makes no provision for "jurisdictional enclaves" (Pet. 10, 11) of non-Indian fee land. "[T]he existence or nonexistence of an Indian reservation, and therefore the existence or nonexistence of federal jurisdiction [does not depend] upon the ownership of particular parcels of land * * *." *Seymour* v. *Superintendent*, 368 U.S. 351, 358 (1962).[10]

The Court has also rejected petitioners' contention that 18 U.S.C. (Supp. V) 1151 applies only to criminal cases. See *DeCoteau* v. *District County Court*, 420 U.S. 425, 427 n.2 (1975), and cases cited therein. Thus, having conceded that the Indian Trader statutes are applicable to petitioners' businesses if they are located within "Indian country," and finding no support for a narrow definition of that term in this Court's decisions, petitioners have failed to present an issue warranting this Court's review.

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[10]Significantly, Congress *has* created "jurisdictional enclaves" of non-Indian fee land in certain circumstances. In 18 U.S.C. 1154(c), Congress enacted a special definition of "Indian country" applicable only to the prohibition on introducing liquor into "Indian country." That statute exempts from the definition of "Indian country" "fee-patented lands within "non-Indian communities" and rights-of-way through reservations." See *United States* v. *Mazurie*, 419 U.S. 544, 547 (1975). Had Congress wanted to create similar "jurisdictional enclaves" for businesses such as petitioners', it thus knew how to do so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

DIRK D. SNEL
MARIA A. IIZUKA
Attorneys

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